

DOCKET
NUMBER

U.S. DISTRICT COURT
WEST. DIST. OF WISCONSIN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JUL - 1 2002

NEIL GAIMAN and MARVELS AND
MIRACLES, LLC,

Plaintiffs,

v.

TODD McFARLANE, TODD
McFARLANE PRODUCTIONS, INC.,
TMP INTERNATIONAL, INC., and
McFARLANE WORLDWIDE, INC.

Defendants-Counterclaimants,

And

IMAGE COMICS, INC.,

Defendant.

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JOSEPH W. SKUPNIEWITZ, CLERK

CASE
NUMBER

Case No. 02-C-0048-S

**AFFIDAVIT OF TODD G. SMITH IN SUPPORT OF DEFENDANTS TODD
McFARLANE'S, TODD McFARLANE PRODUCTIONS, INC.'S, TMP
INTERNATIONAL, INC.'S AND McFARLANE WORLDWIDE, INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

After being first duly sworn, Todd G. Smith deposes and states as follows:

1. I am one of the attorneys for the McFarlane Defendants and make this Affidavit upon personal knowledge.

2. Attached as Exhibit A are true and correct copies of pages 191-192, 207-210 and 212-214 from the transcript of the June 24, 2002 deposition of plaintiff Neil Gaiman.


3. Attached as Exhibit B are true and correct copies of pages 147, 157 and 242 from the transcript of the June 19-20, 2002 deposition of defendant Todd McFarlane.

Dated this 1st day of July, 2002.



Todd G. Smith

Signed and sworn to before me this
1st day of July, 2002.



Notary Public, State of Wisconsin
My Commission: 03-05-06

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1 whatever you have.

2 Q And when you say whatever you have, you are referring
3 to Exhibit 19?

4 A Yes.

5 Q You will include whatever you have in the way of
6 inventory or film for Miracleman received from Eclipse
7 in the bankruptcy buyout, correct?

8 A Uh-huh.

9 Q You have alleged in this lawsuit that -- hold on. Did
10 you ever receive a copy of Spawn issue 9?

11 A Yes.

12 Q When was that?

13 A I would have received -- I was first handed one at
14 Oakland in 1993, I think April of 1993.

15 Q Right about when it came out?

16 A Right. It was the day of the publication. Todd and I
17 were signing them together.

18 Q What about issue 26, did you ever receive a copy of
19 that?

20 A Probably.

21 Q What about the Angela miniseries?

22 A Yes. They would have sent me my author copies.

23 Q Did you ever see the trade paperbacks that were being
24 published of the Spawn series?

25 A By the time they were publishing the trade paperbacks,

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1 nobody was sending me stuff automatically. Getting
2 stuff out of Todd was getting harder.

3 Q Do you know who published the trade paperbacks, and I
4 don't know if they were all published by the same
5 company, were they all published by Image, do you
6 know?

7 A As far as I know, the Image I is on the ones. I saw
8 the most recent one, Angela's Hunt, for the first time
9 at a convention called Aggicon in Texas several months
10 ago which was the first time I had seen that in the
11 flesh and that was definitely published by Image in
12 2000.

13 Q Do you recall if you ever saw the trade paper, the
14 second trade paperback, the one that contained issue
15 9?

16 A I don't think they sent me a copy of that.

17 Q Do you recall if you ever saw it anywhere?

18 A I have seen it certainly since this case started.

19 Q I'm talking back prior to this case starting?

20 A I might have seen one because somebody would have --
21 at signings people put stuff in front of you, but you
22 don't actually stop and look at it, you sign it.

23 Q You were doing throughout -- let me ask you this. Was
24 there any time period in 1993 through 1998 that you
25 were not actively pursuing your career as a writer of

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1 A We have the exchange of letters.

2 Q After you get -- was it after the early 1999 letter
3 from Todd McFarlane?

4 A Oh, no, before that. We are in late '96, early '97 I
5 think at this point. We are prior to -- in fact, I
6 think some of this stuff, my memory of things is that
7 the May, '97-ish, July, '97-ish is one of the things
8 that closed it because Todd -- I spoke to Titan and
9 said, you know, I really don't want you publishing
10 this until you are assured that I will be getting some
11 royalties from it.

12 And they wrote a letter to Todd and got a reply
13 from him saying that he had a deal with me and would
14 definitely be paying me royalties. So they were
15 incredibly relieved on that.

16 And I asked for them to make sure that I had the
17 standard copyright notice that you get in the U.K. --

18 Q What is the standard --

19 A Are you familiar with that?

20 Q No. Tell me what you know about the standard
21 copyright notice in the U.K.

22 A There is a clause in the U.K. copyright where you get
23 identified as the author, the copyrights and patents
24 act, which gives you, you know, your -- it's partly
25 the moral right and partly you are the author from a

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1 copyright purpose, so they put in whatever the
2 standard. And I just said look, can I have the
3 standard wording, please.

4 Q And you were familiar with the fact that there was
5 such a thing as standard wording how?

6 A Because I'm an author in the U.K. and every book I get
7 of mine would have a standard wording in the front
8 that would say the right of, you know, Gaiman to be
9 identified as the author of this book has been
10 asserted under the copyright and patents act, and so
11 forth. I got books before with it in.

12 And I thought well, I am the author, can I have
13 this, please, to Titan. I said I really feel like I
14 ought to at this point. And they said -- and they put
15 it in and they said -- and I said I never signed any
16 of my rights away from this and as far as I'm
17 concerned I'm certainly the co-copyright holder on
18 there.

19 And I don't know, I don't even know if they
20 checked it with Todd or if they put it in and then
21 Todd complained or something, but it wound up being
22 changed to the rights of Neil Gaiman and Todd
23 McFarlane. They phoned me back and said is this okay
24 and I said yes, it's absolutely fine. So although
25 Todd hasn't actually -- wasn't actually the artist in

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1 the book, that was Greg Capullo.

2 Q You say that you were familiar with the fact that
3 there was standard language in the U.K., copyright
4 language in the U.K., because you are an author in the
5 U.K., is that correct? I mean, it was your experience
6 as being an author in the U.K. gave you the knowledge
7 that there was such a thing as standard copyright
8 language that should be put in books in the U.K., is
9 that correct?

10 A I had seen it in books before.

11 Q And you are an author -- were you not an author in the
12 United States at the same time?

13 A Yes, but that language is not language that appears in
14 the front of American books.

15 Q What do you know about the language that appears in
16 front of the American books?

17 A Very little, but I know that on some of my stuff I
18 will actually claim, you know, put specific copyright
19 notices. I'm just sort of starting to educate myself
20 now, very much now that this court case has come up.

21 Q But you have been publishing books -- when was the
22 first time you published a book in the United States
23 that you held the copyright to, do you know?

24 A You are going to have to define the word publish in
25 this case.

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1 Q When is the first time one of your works was published
2 in the United States? And when I say your works, I
3 mean a work that you retain the copyright ownership
4 to.

5 A I was trying to work out stuff from the U.K. that was
6 being imported into the U.S.?

7 Q Either way.

8 A First stuff that would have been imported would have
9 been my book Violent Cases.

10 Q When was that?

11 A 1987.

12 Q Do you recall when the first book that was not
13 imported from the U.K. but that it was actually
14 published in the United States as a new work that you
15 retain the copyright interest in?

16 A Probably a book I did called Don't Panic.

17 Q When was that?

18 A I think it was published in '88.

19 Q 1988?

20 A 1988.

21 Q Not 1888?

22 A Definitely not, I would remember.

23 Q You mentioned doing some signings with, you had done
24 some book signings with Todd, correct?

25 A No.

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1 Q Do you recall if you received -- I think you said you
2 had got an author's copy of Spawn 9, is that correct?

3 A Yes.

4 Q Do you recall if you got an author copy of Spawn 26?

5 A Don't know.

6 Q You don't recall one way or the other?

7 A I don't recall one way or the other.

8 Q Do you recall if you got an author's copy of the Angela
9 miniseries?

10 A Yes, I would have got them.

11 Q What about the first Angela trade paperback?

12 A Haven't I testified -- did we do this already?

13 Q I'm not sure if I did. Bear with me.

14 A I don't know on the Angela trade paperback.

15 Definitely didn't see -- I definitely haven't seen
16 Angela's Hunt, and there was definitely another
17 version of the Angela trade paperback, I think,
18 because I have signed, I mean, the trouble with --

19 Q Was it called Pathways to Judgment, does that ring a
20 bell?

21 A Don't know. I have signed stuff, people put stuff in
22 front of me at signings and it's been stuff that I
23 have written. It's been the Angela stuff and I have
24 never seen it before and it was never sent to me,
25 there is -- you know, so I can't say.

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1 And for some reason, most of this, until we got
2 to this case, I managed somehow to resist the urge to
3 go out and buy my own work in order to have copies of
4 it on my shelves.

5 Q Would you agree with me that it's possible that some
6 of these book signings you may have signed a copy of
7 the Angela miniseries?

8 A Oh, absolutely.

9 Q Would it be possible that you signed a copy of the
10 first Angela trade paperback?

11 A It's certainly possible that I would have signed
12 copies because people put them in front of you. You
13 don't stop to look at the book. You just, you know,
14 you -- I don't know if you have ever done -- well, if
15 it was Mike, he would have done that.

16 You have 500 people. You grab the book, you open
17 it, you sign it. It's very often my impulse with the
18 Angela stuff, and I may even have done it on a couple
19 of occasions where I have actually declined to sign
20 it. People put some of the trade paperbacks in front
21 of me and I would say I don't get royalties on this.

22 Q Back in 1994, '95, at that point in time, do you
23 recall doing signings which you were handed copies of
24 Spawn 9?

25 A Yeah.

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1 Q Do you recall back --

2 A Todd and I both sign on the cover, we try to get in
3 the same place because there is one nice white place.

4 Q Do you recall back in 1994, '95 time frame signing any
5 trade paperbacks, say that trade paperback number 2
6 which contained issue 9 in it?

7 A I must have signed that at some point, but I, you
8 know, I go on a book signing tour, the Stardust tour
9 was 30 cities, one, probably an average of one signing
10 a day, but several signings were two a day. You have
11 got somewhere between 400 and 800 people that are
12 assigning and you put out a rule limiting everybody to
13 three items a piece --

14 MR. ARNTSEN: Since it's after
15 five, let's go with I don't recall.

16 A Okay. I'm sorry.

17 Q Give me 30 seconds here.

18 A Sorry.

19 Q No, believe me, you are fine. One last question, or
20 little issue on the 1997 agreement. And again I know
21 you heard Todd's deposition in which he explained that
22 at different times he wears different hats, so to
23 speak, because he has different roles in the different
24 companies.

25 Who in your opinion, who in your understanding

1 correct?

2 A. It appears.

3 Q. And it states here that -- under item 2 you
4 state that you are the creator. It states that you're
5 the creator of the text and art work, correct?

6 A. Where am I looking?

7 Q. Nature of Authorship, item 2 a.

8 A. What did you want me to look at?

9 MR. KAHN: It says "Work for Hire" and then
10 "Nature of Authorship."

11 THE WITNESS: Oh, I see.

12 BY MR. ARNTSEN:

13 Q. Is that correct?

14 A. Right.

15 Q. But you weren't the creator of the text of
16 Spawn Issue 9, were you?

17 A. No.

18 Q. Neil was, right?

19 A. Right.

20 Q. Do you know -- do you recall the process that
21 caused you to apply for a copyright for Spawn Issue 9 in
22 April of 1996?

23 A. No. It probably wouldn't have been about
24 Issue Number 9. It would have been the comic books as a
25 whole.

1 Q. What do you understand Exhibit 45 to be?

2 A. They appear to be Certificates of
3 Registration.

4 Q. For Angela 1, 2 and 3?

5 A. Right.

6 Q. And you are listed as the copyright claimant
7 for those works, correct?

8 A. Right.

9 Q. And you are listed as the creator of the text
10 and art work for those works, correct?

11 A. Where am I looking there again?

12 Q. 2 a, Nature of Authorship.

13 A. Right.

14 Q. And you weren't the creator of the text or
15 the art work for those works, were you?

16 A. Right.

17 Q. Did you ever tell Neil that you were applying
18 for a copyright for Angela 1, 2 and 3?

19 A. I don't recall.

20 Q. Do you recall what you paid Neil for his work
21 for Angela 1, 2 and 3?

22 A. No.

23 Q. I'll show you a document that was previously
24 marked Exhibit 9 and I wonder whether that would refresh
25 your recollection at all.

1 Burke and did some work maybe for Jon.

2 Q. Where was Beth Ann's office in January of
3 1995, which is the date of Plaintiffs' Exhibit 37?

4 A. The exact office?

5 Q. Was it in Phoenix or was it in Michigan?

6 A. No, it was in the Detroit, Michigan area.

7 Q. Where was your office in 1995?

8 A. In Phoenix, Arizona.

9 Q. Did you review this Certificate of
10 Registration before someone signed it and sent it in on
11 your behalf?

12 A. No.

13 Q. Is the name of the author in paragraph 2 of
14 this registration, namely Todd Dean McFarlane, your
15 understanding of who the copyright owner was?

16 A. No. Like I said, those should have been Todd
17 McFarlane Productions. So, Todd McFarlane, an
18 individual, has never grabbed any of those rights.

19 Q. And did anyone talk to you about why the box
20 under 2 a for contribution to this being a work made for
21 hire, did anyone talk to you about that before that was
22 checked?

23 A. No.

24 Q. Earlier today Mr. Gaiman's attorney showed
25 you a group of scripts and thumbnails marked Plaintiffs'